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Brief of Cohn for Appellants

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IN THE

Supreme Court of the United States.

THE STATE OF ARKANSAS and JOHN A. HINKLE,
as Sheriff of Independence County, Ark.....Appellants,

v. **No. 380.**

CHARLES A. M. SCHLIERHOLZ.....Appellee.

BRIEF FOR APPELLANTS.

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BRIEF FOR APPELLANTS.

Charles A. M. Schlierholz filed his petition before the honorable John A. Williams, United States District Judge for the Eastern District of Arkansas, for release under *habeas corpus*, from the custody of John A. Hinkle, sheriff of Independence County, Ark., who, he alleged, held him under warrants of arrest issued by the circuit court of said Independence County, upon indictments duly found by the grand jury of that county. He alleged that he, as special agent of the General Land Office of the United States, seized and marked certain rafts of timber with the letters "U. S.," under the orders and directions of the commissioner of the said office; said orders and directions being to "seize any timber unlawfully cut from the lands of the United States on the property of the United States" (Record, p. 1).

An order was duly made by the said district judge directing the clerk of the district court for the northern division of the district, to issue a writ of *habeas corpus* directed to the said sheriff, and providing that service of the writ should also be made upon the attorney of the State of Arkansas for the Third Judicial Circuit (id., 2).

The writ was issued by the said clerk on May 23, 1899, and was directed as well to S. D. Campbell, the attorney of the State for said Third Judicial Circuit, as to the sheriff of said county, and commanded production of the body of said petitioner forthwith, together with a return showing the term and cause of imprisonment, and a production of authority for such detention (id., 2, 3).

Upon the petition of the State and John A. Hinkle, the said sheriff, acting through the said Campbell, asking that the *habeas corpus* proceeding be transferred to the District Court for the Northern Division of the Eastern District of Arkansas (id., 3), an order was duly made transferring said proceeding to said district court (id., 9), and thereupon responses were filed by said State and said Hinkle, as such sheriff, to the said writ of *habeas corpus* (id., 3 to 6).

The sheriff's return shows that he detained said petitioner under two warrants of arrest issued by the Circuit Court of Independence County, Ark., upon two indictments duly found by the grand jury of the said county on the 7th day of April, 1899; in one case the charge being the unlawfully taking possession of timber in violation of the statute laws of the State of Arkansas, and in the other, the charge being that of unlawfully marking

timber in violation of the statute laws of said State. Copies of the warrants are exhibited. The response of the State shows that the said petitioner, wholly misconceiving and being outside of his duties as special agent of the General Land Office of the United States, and outside of his instructions, and contrary to the laws of the United States and all rules of any department, and without process of any kind or any authority of law, but ignoring all laws, regulations, etc., on or about April 10, 1898, seized the timber of C. W. Hamilton, J. M. Hamilton, and W. J. Keener, the same being at the time the property of and in the possession of the said C. W. Hamilton, J. M. Hamilton, and W. J. Keener, and placed the mark "U. S." upon the same, said acts being in violation of sections 6140 and 6142 of Sandels & Hill's Digest of the laws of the State. That on account of said illegal seizure and branding, indictments were found by the grand jury of said county against said petitioner, one charging him with the unlawful taking, and the other with the unlawful marking, of timber. And warrants were duly issued thereon, under which petitioner was arrested by the said sheriff. Copies of the indictments are attached to this response.

The State, in its response, denied that the timber so seized was unlawfully cut from any lands of the United States, but said that it was the property of the parties in whose custody it was found by said petitioner, and it denied that he had any authority to seize it from them without process and mark it "U. S."

It further denied that the said indictments were, as alleged by petitioner, procured at the instigation of any person, to em-

barrass the petitioner in the discharge of his duties as such special agent, but alleged that they were duly returned by the grand jury in pursuance of their oaths and the proper discharge of their duty, and it alleged that petitioner had an adequate remedy in its courts for any defense he might have.

The indorsements on the warrants authorized the sheriff to admit the accused to bail in the sum of $200 in each case.

The testimony in the case, as agreed upon by the parties, shows that C. A. M. Schlierholz was sent to the State of Arkansas by the Commissioner of the General Land Office, with instructions and directions to investigate certain alleged trespasses committed in the State of Arkansas on the public domain by parties unlawfully cutting timber from land belonging to the United States. Certain instructions of the General Land Office were then offered, which, it is contended by appellee, directed said petitioner to seize any timber he believed to have been cut from government land, even in the hands of other persons claiming ownership, against their protest, and to brand the same with the letters "U. S.," unless the seizure was resisted or caused a breach of the peace. This testimony was admitted over the objection of appellants. And these rules and regulations go on to stipulate what shall be done with the timber so seized.

There is nothing in the testimony to prove that Schlierholz acted under these instructions in seizing the timber of the Hamiltons and Keener. But the agreement shows that the timber seized and branded, for which acts these indictments were found, was at the time in the possession of the persons whose names appear as witnesses on the indictments (that is, the said C. W.

Hamilton, J. M. Hamilton, and W. J. Keener, see Record, pp. 7 and 8), and was seized by the said Schlierholz while he was acting as such special agent of the General Land Office over and notwithstanding their protest, they at the time claiming ownership of the said timber; that at the time the said seizures were made the said Schlierholz believed that the said timber had been cut from the public domain, etc.

"That at the time said seizures were made and the timber branded he had no writ or process from any court, but acted with no authority other than the rules of the General Land Office of the United States" (id., 10, 11).

The district court released and discharged the said petitioner from custody (id., 9), overruling the objections to the admissibility of the rules and regulations of the General Land Office offered in evidence (id., 11).

At the request of the appellants the court below certified to this court the question of jurisdiction of said court to release and discharge the prisoner, and the propriety of the order and judgment of the said court in so releasing and discharging him (id., 13).

And the appellants filed an assignment of errors which, in addition to the question of jurisdiction, presents other points (id., 12).

I.

Upon an appeal from the Circuit Court of the United States in a case of *habeas corpus*, all questions of law or of fact, arising upon the record, including the evidence, are open to consideration; and the circuit court has no authority to make con-

clusive findings of fact, as it might do in actions at law upon waiver of a jury, or in cases of admiralty.

Johnson *v.* Sayre, 158 U. S., 109, 115, 116.

Citing

Ralli *v.* Troop, 157 U. S., 386, 417.
In re Neagle, 135 U. S., 1, 42.
Bond *v.* Dustin, 112 U. S., 604.

And this cause was appealable even though the petition was addressed to, and the issuance of the writ ordered by, the district judge, since the proceedings and final order were all made the action of the court.

Harkrader *v.* Wadley, 172 U. S., 148, 162.

In this case the assignment of errors presents the question of jurisdiction, and also questions bearing upon the constitutionality of the proceedings of the special agent, if it should be held that he was acting within the proper orders of the General Land Office.

Where this court has acquired jurisdiction of a cause by a general appeal, and the question of constitutionality is involved, it will consider that question, as well as all others in the record, even though the question of jurisdiction had not been properly certified to it.

Chappell *v.* United States, 160 U. S., 499, 509.

II.

A. This cause coming here for a general review of the law and the facts, we present the questions involved in the record in the order stated in the assignment of errors (Record, p. 12).

Did the court below have jurisdiction to release and discharge the appellee from the custody of the sheriff of Independence County?

The law of the State of Arkansas, at the time the appellee seized the timber of C. W. Hamilton, J. M. Hamilton, and W. J. Keener, was contained, among other things, in sections 6140, 6142, and 6144, of Sandels & Hill's Digest of the laws of the State. These sections read as follows:

"Section 6140. No person other than the owner thereof, or his agent, shall take possession, drive, run, or in any way dispose of any log, spile, railroad tie, or other timber, shingles or lumber floating upon, lying, or being in any river or other waters in this State, or any boom therein, or on the shore or banks thereof.

"Sec. 6142. No person other than the owner or his agent shall make or place, or cause to be made or placed, any mark upon any log, railroad tie, or other timber, or lumber upon or in any river or other waters in this State, or in any boom therein, or on, or near the banks or shores thereof.

"Sec. 6144. Any person violating any of the four preceding sections shall be deemed guilty of a misdemeanor, and on conviction, punished by a fine not exceeding $1,000, or by imprisonment in the county jail not exceeding six months, or both such fine and imprisonment."

This law, enacted by the State, did not require, as an incident to the commission of the offenses aimed at, that they should be accompanied by force or be attended by breaches of the peace. The law aiming to prevent the commission of offenses that were most frequently done when the owner's back was turned, and he was distant from the scene of action, undertook to meet an evil that required just such a remedy. Without discussing the fact that at common law trespasses of the nature mentioned in these

sections were regarded with strong disapproval, and justified, in any event, the resort to the civil remedy, it cannot admit of serious controversy that it was within the province of the State to do away with the idea that force or a breach of the peace was an essential ingredient to the conversion of such acts of wrongdoing into penal offenses.

If it is within the province of the State to create a new penal offense by requiring the master of a vessel arriving from a foreign port to report to the mayor or recorder of a city an account of its passengers; or if it can prohibit the manufacture or sale of liquor previously authorized; or can seriously affect the manufacture and sale of oleomargarine previously authorized, upon what principle can the State be denied the right to convert certain classes of trespasses, of specially objectionable character, into crimes? See

Mayor of New York *v.* Miln, 11 Peters, 102.
Mugler *v.* Kansas, 123 U. S., 623.
Kidd *v.* Pearson, 128 U. S., 1.
Powell *v.* Pennsylvania, 127 U. S., 678.
Lawton *v.* Steele, 152 U. S., 133, 136 *et seq.*

With this law in force, the appellee, without process of any kind, upon his own unsupported judgment, in the guise of a special agent of the United States government, took it upon himself to seize certain timber claimed by and in the possession of C. W. Hamilton, and other individuals, and to mark it "U. S." against the protest of the owners.

It is unnecessary to say that such a course of conduct would not have been tolerated if an individual had been acting in his own behalf. If Schlierholz had acted in this manner in his own behalf he would have been a rank trespasser, and would have

been clearly amenable to the law of Arkansas above mentioned. And he would not have had any standing in a Federal court to air his grievance by *habeas corpus*, even though he had come from some other State in which he had citizenship.

What difference did it make that he was a special agent of the Land Office for proper purposes? The very fact that he was an officer of the government rendered his duty all the greater to exercise his powers cautiously and discreetly. What was not permissible to an individual was not permissible to him as special agent. He was not invested with authority to take away the timber in the possession of third persons, upon his own unsupported belief that it had been cut from the public domain. The appellee, fancying that the fact of his special agency gave him world-wide discretion and power, took it upon himself to do that which must shock the sense of propriety of every law-abiding citizen; that is, he took it upon himself to settle the question of right at once, without notice or a hearing to the apparent owners, by seizing the timber of the two Hamiltons and Keener, against their protests. It is no excuse for him, I submit, to say that he was justified in this because the apparent owners did not shoot him down or club him into insensibility to prevent him from making this seizure. That would not have increased the gravity of his wrongdoing. It might have excited sympathy for him. See

Handford *v.* United States, 92 Fed. Rep., 881.

In the case of Handford *v.* United States, the Court of Appeals for the Eighth Circuit passed upon the acts of this very same officer, committed in the same county, as appears in the record in this cause. It was there said, among other things:

"The title of the government to the logs grown on the land of an individual, and purchased by it, is precisely the same that it is to logs grown on its own land; and if one should wrongfully take the logs of the government, purchased from the owner on whose land they grew, or wrongfully cut and remove logs from the land of the government, the remedy in either case is by an action of trespass or replevin. The case is not different in its legal aspects from what it would have been if the government agent had gone into the private residence of the plaintiffs in error and seized and carried off their furniture on the claim that it was made out of timber cut on government land, for the timber at all stages of the conversion remains the property of the owner. Woodenware Co. *v.* U. S., 106 U. S., 432. The right to seize, and the legal consequences of the seizure, would be the same. There is no higher or different right to seize logs cut from government land under existing laws than there is to seize any other kind of personal property which it is claimed the government owns."

And it was said that the government had no other or further right of seizure than would have been the case with a private individual.

In that case the question arose in a proceeding *in rem* brought in the lower court by the government to condemn and sell several rafts of logs that had been seized by the said agent while in the hands of C. R. Handford & Bro., and it was decided that the seizure gave no right, and that the proceeding could not be maintained.

The mere fact that a party is a special agent of the government does not exempt him from the jurisdiction of State laws any more than a State officer would, as such, be exempt from the jurisdiction of the Federal courts, on this account, in a suit for wrong done.

Buck *v.* Colbath, 3 Wall., 334, 342.
U. S. *v.* Kirby, 7 Wall., 482.

Virginia *v.* Paul, 148 U. S., 107.
The Monte Allegre, 9 Wheat., 616, 645.
Slocum *v.* Maberry, 2 Wheat., 1.
McKee *v.* Raines, 10 Wall., 22, 25.
Hagood *v.* Southern, 117 U. S., 52.
Poindexter *v.* Greenhow, 114 U. S., 270.
Hathcote *v.* State, 55 Ark., 181.
Vanderpool *v.* State, 34 Ark., 174.
Harkrader *v.* Wadley, 172 U. S., 148, 163 *et seq.*

In Buck *v.* Colbath, *supra*, the question at issue was whether a marshal of the United States would be protected against a suit for damages at the instance of a third person for goods levied upon under a general attachment. And it was held that he would be suable in the State court, and that his capacity as marshal would not protect him in that case.

That is also the effect of the decision in the case of McKee *v.* Raines, *supra*, the court there saying:

"No act of Congress has been cited from which authority can be derived to the marshal of any court of the United States to seize the goods of one person for the satisfaction of the debts of another" (10 Wall., 25).

In the case of Slocum *v.* Maberry, *supra*, the question arose as to what would be a proper course of procedure if a seizure in admiralty were adjudged to be wrongful. In that case the proper remedy for damages against the officer was held to lie only in the State court (2 Wheat., 10).

In the proceeding against the Monte Allegre, *supra*, a question of liability of the marshal of the United States, for failure of title at a sale made by him through an auctioneer, arose. While it was held that the marshal in his official capacity had no authority to bind himself by a warranty, it was said:

"If he steps out of his official duty, and does what the law gives him no authority to do, he may make himself personally responsible, and the injured party must look to him for redress" (9 Wheat., 645).

In Virginia *v.* Paul, *supra*, the effect of the decision was to render a Deputy United States Marshal amenable to the State court under a charge of murder; and in that case it was contended by the deputy marshal that the offense he stood charged with had been done by him while acting in the performance of his duty as a deputy marshal.

In Hagood *v.* Southern, *supra*, and Poindexter *v.* Greenhow, *supra*, State officers were held to be liable for acts done by them, at the suits of individuals, in the Federal courts, because they had done acts not authorized by law, or had acted under unconstitutional enactments (117 U. S., 70; 114 U. S., 287).

In Hathcote *v.* State, *supra*, a mail carrier was held amenable to a criminal law of the State against carrying concealed weapons. And in Vanderpool *v.* The State, *supra*, a commissioner of a circuit court of the United States was held to be liable to a State criminal law against false imprisonment, because he fined and imprisoned a party when he had no authority of Congress to do so.

In the last cited case it was said, quoting Cooley on Torts, 416, and citing other cases, that when the commissioner so acted, he stepped "over the boundary of his judicial authority, and is as much out of the protection of the law, in respect to the particular act, as if he held no office at all" (34 Ark., 177).

It is noteworthy in these cases that the doctrines announced were most frequently applied so as to leave a ministerial or other

officer liable for acts done in pursuance of some supposed judicial authority. (See further, Wise *v.* Withers, 3 Cr., 331; Dynes *v.* Hoover, 20 How., 65.) But that is far from being the case with the petitioner. He had not, at the time he was acting, any writ or process issued with or without authority, or which did or did not grant power to do what he attempted to do. The appellee acted without writ, process, or congressional enactment. He, indeed, speaks of rules and regulations of the General Land Office, and these are offered and admitted in evidence, but it nowhere appears by any positive statement that he acted under these instructions. In fact those rules and regulations were never calculated to give him the large license and power he exercised, because they provided that he should only make seizure "provided that the party in possession of same does not resist such seizure or same does not cause a breach of the peace" (Record, 10). Now these words imply that there is a distinction between resistance to the seizure and a breach of the peace upon the attempt to make the seizure. Evidently the resistance that was contemplated was not such as involved a breach of the peace. And if a protest was not adequate evidence of such resistance, it would be difficult to conceive what kind of resistance was contemplated unless it was accomplished by a breach of the peace. It is therefore clear that even under the directions he received, the appellee was not authorized to make a seizure against the protest of the owners or parties in possession.

It is common learning that a trespass *vi et armis* is committed when the real property of a person is entered upon without his consent, and that a similar trespass occurs respecting

personal property when the property is taken without or against the possessor's consent.

Cooley, Torts (Ed. 1880), 322, 438.
Chitty, Pleadings, Vol. 1, 192*.

An entering upon property without the consent of the possessor, however peaceable it may be, is a forcible entry.

Croff *v.* Ballinger, 18 Ill., 200.

And good intent or belief of one's right to do such things does not excuse the acts.

Mitchell *v.* Harmony, 13 How., 115, 135.
Bishop, Noncontract Law, sec. 499.

Nor does the illegal order of a superior officer justify such acts.

Little *v.* Barreme, 2 Cr., 170.
Mitchell *v.* Harmony, 13 How., 115, 137.
Bates *v.* Clark, 95 U. S., 204.
Ex Parte Milligan, 4 Wall., 2.
Reichardt *v.* Felps, 6 Wall., 160.
Noble *v.* Union River, Etc., Co., 147 U. S., 165.
United States *v.* Pine River Logging, Etc., Co., 89 Fed. Rep., 907, 917.
Johnson *v.* Jones, 44 Ill., 142, 159.

But there is an allegation in the petition, in its very first paragraph, which throws light upon the extent and meaning of the extracts from the printed instructions which petitioner introduced in evidence. It reads as follows: "That as such special agent he was directed by his superior officer, the Honorable Commissioner of the General Land Office of the United States, to go to the State of Arkansas and seize any timber unlawfully cut from the lands of the United States on the property of the United States" (Record, 1). In other words, the instruc-

tions were that where the agent found timber which appeared to have been cut off of the government domain, lying upon government land, he was to seize it, if such seizure could be made without resistance or without a breach of the peace. That would appear to be more in conformity with the attitude of the government and its departments, and not invest the agents (not infrequently indiscreet and arbitrary persons), with an undue and unseemly amount of power and discretion, and would be in conformity with the views of this honorable court, as announced in Wells *v.* Nickles, 104 U. S., 444, and *In re* Neagle, 135 U. S., 1, 65.

The preceding argument, under this head, I respectfully submit, may be summed up as follows:

That under the statutory law of Arkansas making it a misdemeanor to do such things, and under the common law making it unlawful to perpetrate such acts, the appellee, without authority of act of Congress or any legal authority of any court or officer, took from certain citizens and residents of the State, in the county of Independence, their timber and appropriated it. That he had no immunity from the law of the State because of the fact that he was a special agent of the government, and was as much amenable to its process as any other lawbreaker in the State would be.

Ex Parte Crouch, 112 U. S., 178, 180.

It follows that the lower court should have refused to release and discharge the appellee from the custody of the State court.

If the action of the lower court is sustained, we will have this result:

That the petitioner will have, without a hearing to the owners of the timber, deprived them of their property; and will have deprived the State of the power of protecting its subjects; and the law of the State providing for the regular and orderly method of trying its offenders will be set at naught; and the judgment of a Federal district court or judge will be of higher character than the State tribunals, even though no act of Congress or legal order of any department of the Federal government can be shown to sustain the action of the offender.

Not only do the cases already cited show that in order to invoke the protection of the Federal courts must the officer have acted under a legal act of Congress, order of a department, or judgment or order of a court, as to the very thing or act done, but repeated announcements of this court in *habeas corpus* cases proceed upon that theory, and none other.

Thus, in Tennessee *v.* Davis, 100 U. S., 257, 263, it was only claimed that removal of a case against a Federal officer could be had from the State to the Federal court, if the Federal officer was acting under a Federal law, "and within the scope of his authority" (100 U. S., 263). And this language was repeated in the Neagle case (*In re* Neagle, 134 U. S., 61, 62).

In fact, as is clearly indicated in the reasoning of this court, in the cases which came before it, the Federal jurisdiction, whether exercised by Congress, by the executive, or by the courts, is limited to the authority these possess, and an officer can go no further; and if he does, acts upon his personal responsibility, and is subject to the laws of the proper jurisdiction which relate to his extraofficial acts.

B. Having presented the matters embraced in the first and ond assignments of error, I beg leave to now present the sug- stions covered by the third, fourth, and fifth assignments of ror.

The last paragraph of the last preceding subdivision may made the basis of a more detailed presentation. It relates to e demarcation lines of jurisdictional power.

Our third, fourth, and fifth assignments of error present nstitutional questions. Of course, I know that this court does t quickly take up and decide such questions. And yet, if the cision of the lower court is to be made effective, the provisions the fourth, fifth, and eleventh amendments to the Constitu- on will have to be ignored. For under that decision not only s an unreasonable seizure been sanctioned, but it has been sanc- oned without giving the parties affected an opportunity to be eard, and the State has been deprived of the power to protect s citizens against arbitrary and unreasonable seizures and tres- asses.

Unreasonable seizures are surely those which are made ithout giving the party in whose possession the property seized , and who is claiming ownership thereof, an opportunity to be eard in defense of his own rights. Indeed, before any citizen ould be deprived of his property, a property which was in his ossession and to all appearances his, something more than a mere eneral order of a department, some process in a replevin or a milar process from a competent court, would have to be own. And if a person should do such an illegal act, irectly forbidden by the fourth amendment and dis-

countenanced by the fifth amendment, what possible ground could there be for saying that his act of wrongdoing could not be punished by the State wherein it was done, if its laws prohibited the same? To justify the decision of the lower court it is necessary to hold that although an officer of the United States is not acting within his authority, but is doing a wrong that is within the prohibition of the United States Constitution, and so could not be sanctioned by Congress, by the executive, or by the directions of a court, and is without the pale of the jurisdiction and power of the United States, yet that the State is powerless to deal with him for a crime he has committed against its laws.

What are unreasonable seizures, within the meaning of the fourth amendment, was fully discussed in the great case of Boyd *v.* United States, 116 U. S., 616. Therein it was shown that property of all kinds, including books and papers, and even alleged smuggled goods, was sacred against arbitrary seizure on the part of any governmental officer. If a general warrant had been issued by the commissioner of the General Land Office directing the appellee to arrest any person by him believed to be guilty of timber cutting, under a general John Doe warrant, and to seize the property so believed by him to be cut, it would be promptly held by this court that this was unconstitutional and void.

West *v.* Cabell, 153 U. S., 78.
Mead *v.* Haws, 7 Cowen, 332.
Comm. *v.* Crotty, 10 Allen, 403.
Scott *v.* Ely, 4 Wend., 555.
Grammon *v.* Raymond, 1 Conn., 40.
Haskins *v.* Young, 2 Dev. & Bat. (N. C.), 529.

See also

Boyd *v.* United States, 116 U. S., 616, 624-626.

And yet here there is not even that much to sustain this unreasonable seizure. Here there is nothing to sustain the extravagant pretension of the appellee except general instructions which, taking the most favorable view for him, are of uncertain quantity and meaning, and too general for specific application.

Then regarding the fifth amendment, wherein the right to be heard before property is seized and taken away is explicitly stated. It is hardly necessary to cite the long line of cases upon the meaning of "due process of law." It will suffice to cite Hovey *v.* Elliott, 167 U. S., 409, and R. R. Co. *v.* Chicago, 166 U. S., 226. In the first of these cases the judgment of a court against a contumacious party who would not obey its proper decree to turn back money into its registry which he had improperly received, was held to be void, even against collateral attack, because the court had, as a measure of punishment for the party's contumacy, stricken his answer and testimony from the files and records of the court, and then rendered judgment against him. In the other it was decided that an improper taking of property, without due process of law, might occur, even though a trial by jury had been accorded, if such things were done in connection with the trial by the court as practically deprived the owner of the opportunity of having a fair and proper hearing.

We need not urge the point that here no intervention of a court was invoked by the appellee to give some semblance of propriety to his arbitrary acts.

It is believed to be unnecessary to cite further cases or authority to show that nothing in this case existed which deprived the State of Arkansas of the right to deal with appellee under the process of its Independence Circuit Court.

C. The sixth assignment of error presents the question whether it was in any event proper in this proceeding, by the decision of a district judge (for it might have been by the judge merely), or by a district court, to take away from the Circuit Court of Independence County, Ark., the right to try the petitioner, on indictments duly found, without providing a remedy whereby the petitioner might be made answerable for a disregard of its laws, he at the same time not being in the legal discharge of any duty upon legal warrant duly issued under any act of Congress.

Assume, if it please the court, for the sake of argument, that in a way the petitioner was acting in the discharge of duty as a governmental officer, within the "scope of his authority," what was the proper and correct course under the circumstances?

Sections 641, 642, and 643 of the Revised Statutes provide that in cases in which persons are denied equal rights under the civil-rights laws, and in prosecutions in State courts against revenue officers and officers acting under registration laws pertaining to Federal elections, removals to Federal courts may be had by the process of *habeas corpus cum causa*. These sections have been held to be mandatory as far as the procedural requirements therein mentioned are concerned; and a failure to comply with such requirements deprives the Federal courts of jurisdiction to hear and determine such causes. See

Virginia *v.* Paul, 148 U. S., 107.

There was no law of Congress under which the petitioner could remove the cases against him by *habeas corpus cum causa* into the Federal courts. He was not within the classes who

needed the immediate intervention of the Federal courts, for his protection, so as to deprive the State courts of the power, in the first instance, of trying offenses alleged to have been committed against the State. The enactment of these sections by the process of exclusion pointed out the fact that Congress did not contemplate depriving State courts of the right to try timber agents of the United States, even though the offenses charged against them were within the scope of their authority as such agents. No doubt this honorable court has felt the embarrassment attendant upon removal of indictments from State to Federal courts. But it could not have been the intention that any State causes whatever could be removed to Federal courts, or be even brought before district judges where some government agent claimed governmental protection, under the shorter process of *habeas corpus*, simply because *habeas corpus cum causa* was a cumbersome process, and attended with embarrassments. If that had been the intention, then the sections mentioned were wholly unnecessary, in fact were an absurdity, for they added so much detail and hard work in the administration of such cases that if *habeas corpus* accomplished everything they might well be regarded as absurd or ridiculous in character. That, however, has not been judged to be the case. The sections referred to are sensible, and meet a real need.

But they demonstrate that it is not proper to take away from State courts the power to try offenses by indictments, or other regular process, by the issuance of writs by Federal judges, unless some similar method of inquiry to that given by State law is accorded the State sovereignty, so that its sovereign rights may

be as much protected as the alleged or pretended rights of the government officer. And they further demonstrate that unless an express law gives a method by which such causes can be removed by *habeas corpus cum causa*, whereby the proceedings in the State courts may go to Federal courts, to be tried regularly on the indictments or informations which were found in the State courts, they should not be removed for the protection of an officer who is not within the purview of section 642.

In line with this reasoning are the utterances of this court. Although prior to that time Federal *nisi prius* judges had taken from State courts of the highest character, causes pending before them, where constitutional questions were involved under the Constitution of the United States, by the decision of this court in the case of Robb *v.* Connelly, 111 U. S., 624, it was settled that the State courts had the right to decide such questions in the first instance, and that it was improper to take this right away by the summary process of *habeas corpus*, in the manner referred to.

And since this case was decided, repeated decisions have been announced here which carry the doctrine further, and hold that it is most proper in all cases, except perhaps where judicial officers have acted in discharge of the judicial requirements of Federal tribunals, or in some other very pressing and plain case, to allow the State courts to proceed with causes properly before them, leaving the aggrieved party to his final appeal to this court, if his rights under any act of Congress shall be disregarded.

Baker *v.* Grice, 169 U. S., 284.
Whitten *v.* Tomlinson, 160 U. S., 231.
Pepke *v.* Cronin, 155 U. S., 100.
New York *v.* Eno, 155 U. S., 89.

Ex Parte Frederick, 149 U. S., 70.
Cook *v.* Hart, 146 U. S., 183.
In re Wood, 140 U. S., 278.

And it has been decided that the writ of *habeas corpus* cannot be used to obstruct the ordinary administration of the criminal laws of the State.

In re Wood, 140 U. S., 278, 289.
McElvaine *v.* Brush, 142 U. S., 155, 160.
Bergeman *v.* Baker, 157 U. S., 655.

The argument under this subdivision must be tested by what could and does occur where district or circuit judges decide *habeas corpus* cases releasing persons held under State process. In such cases no appeal lies to any court. The right of appeal which previously lay in *habeas corpus* cases from the decision of a district judge to the circuit court, was taken away by the act which created the court of appeals. But this act did not give appeals from the decisions of district or circuit judges to either that or to this court. And so the decisions of these judges under *habeas corpus*, where unfavorable to State action, will operate as final writs of prohibition to all State courts, even the supreme courts of the States. It is apparent that under these circumstances the doctrine I contend for is best calculated to do justice to the State. Indeed, the taking away by one jurisdiction of the right to try cases in another jurisdiction is so anomalous and extraordinary that it would seem it ought not to be done except in the way pointed out by act of Congress, by removal or by appeal. But where, under the decisions of this court, it is permitted, without positive enactment of Congress, it should be confined to cases of the most urgent character. This, I take it,

is cases where judicial officers are acting in pursuance of the judicial requirements of the courts of the United States, or other very exceptional cases. In any ordinary case the danger of oppression to a governmental officer by the courts of a State, in times of peace, is too remote, and is of much less importance than the extraordinary act of depriving the State of a jurisdiction, legitimately claimed, especially where, as in this proceeding, the party has the right to give bail bond, and afterwards appeal to this court to be fully protected.

It is true appellee complains in his petition that the indictments were found at the instance of others who are trying to embarrass him in the discharge of his duty. But as there is no evidence in the record to sustain that allegation, it will hardly be accepted as true. It will rather be presumed that the grand jury which returned the indictments did their duty by returning them without bias or prejudice.

D. The seventh and last assignment of error relates to the introduction of certain rules, regulations and instructions of the General Land Office. These, as already claimed, were wrongly admitted in evidence. If they authorized or countenanced an illegal seizure they were of no effect.

Little *v.* Barreme, 2 Cr., 170.
Mitchell *v.* Harmony, 13 How., 115, 137.
Bates *v.* Clark, 95 U. S., 204.

If they authorized unconstitutional acts they were ineffective.

Ex Parte Milligan, 4 Wall., 2.
Reichardt *v.* Felps, 6 Wall., 160.
Noble *v.* Union River, Etc., Co., 147 U. S., 165.

United States *v.* Pine River Logging, Etc., Co., 89 Fed. Rep., 907, 917.
Johnson *v.* Jones, 44 Ill., 142, 159.

If they did not, when fairly construed, authorize the doing of the illegal acts of the petitioner they were equally immaterial for him.

So that from any standpoint they were inadmissible. It could not be claimed that these rules, regulations and instructions were equal in force to an act of Congress, or the writ or order of a proper court, within the exercise of its jurisdiction.

United States *v.* Eaton, 144 U. S., 677, 687, 688.

But even if they were equivalent to an order of court, they would be as void, for vagueness and generality, as any general warrant would be authorizing the caption of anybody or anything within the provision of any penal law.

CONCLUSION.

In view of what has been said in this brief, it is contended that the order discharging the petitioner was beyond the jurisdiction of the lower court, was in disregard of the Constitution of the United States, and was otherwise improper and unjustifiable, and it is now submitted that by the decree of this court the right and power of the State of Arkansas to deal with the petitioner, through its courts, should be recognized and enforced.

Very respectfully,

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